

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**BOB'S TIRE CO., INC. AND
B.J.'S SERVICE COMPANY, INC.**

Cases 01-CA-183476¹

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION
LOCAL 328**

Richard Concepcion and Meredith B. Garry, Esqs., for the General Counsel.

*Gregory J. Koldys, Esq., (Koldys and Kelleher, P.C., Dartmouth, Massachusetts)
for the Respondent.*

Marc B. Gursky, Esq. (Gursky Wiens, North Kingston, Rhode Island) for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Pawtucket, Rhode Island on September 24 and 25, 2018. United Food and Commercial Workers (UFCW) Local 328 filed charge 1-CA-183476 on September 2, 2016, alleging that Respondent unilaterally changed its bonus system and illegally subcontracted unit work to the Masis Staffing Agency. The General Counsel issued the initial complaint in this case on December 30, 2016. The fifth and last consolidated complaint issued on May 29, 2018.

A week prior to the trial in this case, the parties settled most of the outstanding allegations of the fifth consolidated complaint. There was no non-admissions clause in the settlement agreement. Thus, Respondent conceded that it violated the Act with respect to the settled charges, which involved, among other things, Respondent's failure to comply or timely comply with union information requests.

¹ The fifth consolidated complaint lists 12 separate cases associated with this matter. I have listed only the case number in which the unsettled allegations in paragraphs 29 and 30 of the fifth consolidated complaint were initially raised.

Therefore, only paragraphs 29 and 30 of the complaint were litigated. Paragraph 29 alleges that since November 15, 2015 Respondent subcontracted bargaining unit work to non-unit employees. Paragraph 30 alleges that since January 1, 2016, Respondent materially modified its discretionary bonus system for unit employees.

The Charging Party Union and B.J.'s Service Company, which is a staffing agency, entered into a non-Board settlement prior to hearing, thus only allegations concerning Bob's Tire Company were litigated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, recycles car and truck tires at its facility in New Bedford, Massachusetts. Respondent annually purchases and receives goods valued in excess of \$50,000 directly from points outside of Massachusetts. It also sells and ships goods valued in excess of \$50,000 directly to places outside of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, UFCW Local 328 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Bob's Tire Co. has been in business since 1976. It has a yard in Bedford, Massachusetts to which tires are either delivered by other companies or brought in my trucks belonging to Respondent. In the yard employees separate the good tires from the unsalvageable tires. Good tires are resold; damaged tires are shredded and sent to a paper mill in Maine. For a period of time, employees in the yard cut the treads of passenger car tires, banded them together and loaded them into sea containers for shipment to India.

After winning a Board election, on October 1, 2015, United Food and Commercial Workers Local 328 was certified as the exclusive bargaining representative of the following stipulated bargaining unit:

All full time and regular part time loaders, unloaders, machine operators, yard workers, inspectors, tire painters and truck helpers employed by Bob's Tire Co., Inc. and/or B.J.'s Service Company, Inc. working at Bob's Tire Co. location on Brook Street, New Bedford, MA but excluding all other employees, mechanics, shredder operators,² truck drivers, clerical employees and supervisors as defined in the Act.

² This exclusion applies to one specific employee, Andrus Legaro Marrick. Masis Staffing, discussed below, did not provide Respondent with a shredder operator.

For some period of time prior to October 1, 2015, Respondent acquired labor for its yard from B.J.'s Service Company, a staffing agency. These employees constituted most or all of the bargaining unit to which the parties stipulated.

5 Five weeks after the Union was certified, on November 6, 2015, Respondent Bob's Tire Co. entered into an agreement with Masis Staffing Solutions to provide Bob's with employees who would perform light industrial loading and unloading work, G.C. Exh. 11, and Exhibit A to the staffing agreement. Thus, by the terms of the staffing agreement Masis was to provide employees to perform unit work. The agreement stated that the employees provided to Bob's
10 were employees of Masis and were not employees of Bob's. Respondent did not inform the Union of this staffing agreement. The Union discovered this from bargaining unit employees in March 2016.

15 On November 13, 2015, the Union requested that Respondent provide it with a list of all employees in the bargaining unit. On December 4, 2015 Respondent provided a spreadsheet of all employees on Bob's payroll. This included employees hired through B.J. Service Co. but not through Masis. Employees provided by Masis worked at Bob's yard starting the week ending November 14, 2015, G.C. Exh. 16. The Union's November 13 request also included all benefits offered to unit employees, including bonuses. Respondent's December 4 response did not
20 include any information about bonuses. In fact some or all of Bob's employees received a cash bonus at Christmas every year between 2008 and 2014, Tr. 86-87. The amount of the bonus steadily increased from \$20 to \$50 and then to \$100.³ It did not pay a Christmas bonus in December 2015.

25 In January 2016, without notifying the Union, or giving it an opportunity to bargain, Bob's started paying some employees a bonus (or incentive payment) by check (11 or 12 employees per G.C. Exh. 64). This bonus was a paid for exemplary performance, Tr. 143. The checks were \$50 to some employees and \$100 to others, G.C. Exh. 64. Respondent withheld taxes from the bonus, which it had not done when paying bonuses in cash. In September 2016,
30 Bob's unilaterally stopped paying bonuses altogether.

On November 24, 2015, the Union requested documents pertaining to contracts under which either entity agreed to loan, sell and/or contribute equipment, services, money and/or anything of value to the other entity, G.C. Exh. 6. Bob's response on December 10, informed the
35 Union of its contract with B.J.'s Service to provide workers to Bob's, but did not mention its contract with Masis.

³ With regard to the frequency of Christmas bonus payments prior to 2016, I credit former Bob's employee Tomas Ventura's testimony over that of Respondent's owner Robert Bates, who testified that he gave bonuses sporadically. Ventura had no reason to fabricate this testimony.

On the other hand, Ventura's testimony regarding cash bonuses paid to employees who worked on Saturdays is hearsay and is not credited.

Robert Bates' testimony at Tr. 134-39, establishes that between October 15, 2015 and January 15, 2016, Respondent paid cash bonuses in uncertain amounts to some employees. The General Counsel has not established that any employees were receiving these payments on a regular schedule prior to January 2016 or that any received less money as the result of Respondent making the payments by check and withholding taxes.

At a bargaining session in early March 2016, two of Respondent's employees, who were members of the Union's negotiating team, advised the Union that employees provided by Masis were working in Bob's New Bedford yard.

On March 10, Union counsel Marc Gursky wrote Respondent's counsel Greg Koldys stating that it had come to the Union's attention that Bob's was using Masis employees to do bargaining unit work. Gursky requested that Respondent provide it with the staffing agreement and a list of all Masis employees. On June 14, Respondent provided the Union with the staffing agreement without objection.

On August 18, Respondent provided the Union with the names of employees supplied to Bob's by Masis. On September 14, 2016, the company provided a list of Masis employees annotated with a code of the type of work they performed at Bob's. A very large majority performed only general labor work. The testimony of Tomas Ventura, a former employee of Respondent, confirms that in many instances Masis employees did the same work as Bob's employees. Even the owner of Respondent, Robert Bates, testified that at least on some occasions, Masis employees performed bargaining unit work. Respondent's list shows that only 4 of the 111 Masis employees exclusively cut and strapped tire sidewalls and treads, the only type of work which even arguably could be considered non bargaining unit work.

Employees who had been sent to Bob's by B.J.'s Service Company continued to work at the yard at the same time as the employees sent by Masis. Much of the "B.J.'s" employees' work was unloading tires from trucks, then placing tires on a conveyor which took them to a shredder machine. Masis employees at least sometimes did the same work. Masis employees continued working at Bob's through Masis until the week ending October 15, 2016. Some were then directly hired by Bob's or B.J.'s. The number of Masis employees at the yard in a particular week varied and the number of hours they worked varied as well. A quick review of the Masis invoices indicates that the number of Masis employees working at Bob's in any one week was generally in the 18-24 range. Some of these worked a significant number of overtime hours.

Some Masis employees at times did different work than employees working through B.J.'s. For example the cutting and banding of tire treads for shipment to India was done exclusively or almost exclusively by Masis employees. Masis employees also cut sidewalls from passenger car tires, which were shipped to Arizona. Bob's B.J.'s employees used a different machine than Masis employees to cut sidewalls from truck tires. In 2015 Respondent purchased 3 machines to cut the sidewalls off of car tires and a machine to cut the tread from passenger car and truck tires. It had not cut sidewalls from car tires prior to October 2015. The work, however, performed by Masis employees did not require significant training or special skills and could have been done by the employees working at Bob's through B.J.'s.

It is unclear as to whether B.J.'s sent any additional employees while Masis employees were on the site. When Bob's stopped using Masis in October 2016, it continued to employ some Masis employees at the yard via B.J.'s. After that, the former Masis employees performed work that was historically performed by "B.J.'s" employees.

Analysis

Subcontracting

5 An employer may violate Section 8(a)(5) and (1) of the Act by subcontracting bargaining
unit work. Subcontracting is a mandatory subject of bargaining if it involves nothing more than
the substitution of one group of workers for another to perform the same work and does not
10 constitute a change in the scope, nature, and direction of the enterprise, *Fibreboard Corporation*
v. NLRB, 379 U.S. 203 (1964); *Sociedad Espanola de Auxilio Mutuo y Beneficia de P.R.*, 342
NLRB 458, 459 (2004). Bob's Tire has not established that its subcontracting involved a change
in the nature, scope or direction of its operation. Masis employees recycled tires, sidewalls and
treads, as did unit employees. The fact that they may have sometimes or often used different
15 machinery, or prepared recycled tires for different customers does not constitute a change in the
nature, scope or direction of its business, *O.G.S. Technologies*, 356 NLRB 642 646 (2011).⁴

20 Robert Bates, Respondent's owner, admitted that the reason he contracted with Masis
was that he could not get enough employees from B.J.'s, Tr. 174, 217, and that he could have
performed the work subcontracted to Masis with employees he hired directly, Tr. 227. The
employees working at Bob's through B.J.s were just as capable of performing the work done by
Masis employees as were the Masis employees, Tr. 244-45.

25 The fact that no unit employees may have lost their jobs as a result of the subcontracting
is not dispositive as to whether Respondent violated the Act in subcontracting unit work
unilaterally, *Overnite Transportation*, 330 NLRB 1275, 1276 (2000); *Acme Die Casting*, 315
NLRB 202 ft. 1 (1994). A bargaining unit is adversely affected whenever bargaining unit work
is given away to non-unit employees regardless of whether the work would have been done by
employees already in the unit or by employees who would have been hired into the unit. As in
30 *Overnite*, it is not clear that unit employees did not suffer lost work opportunities due to the
subcontracting to Masis. There certainly appears to have been opportunities for increased
overtime for unit employees that were adversely affected by the influx of Masis employees.
Moreover, Respondent appears to have admitted to laying off employees in violation of the Act,
CP Exh. 2.

35 In sum, Respondent violated Section 8(a)(5) and (1) by subcontracting unit work to
Masis. By doing so, it was merely substituting Masis employees for employees who worked for
it, either directly and/or through B.J.'s.

⁴ In a somewhat different context the Board has found that a change in the identity of customers served, or the use of newer equipment to perform the same service, does not affect what is an appropriate bargaining unit or whether there is a continuity of operations to deem a company a successor employer, *A.J. Myers & Sons, Inc.*, 362 NLRB No. 51, slip op. at 7 (2015); *Ports America Outer Harbor, LLC*, *Currently Known as Outer Harbor Terminal, LLC*, 366 NLRB No. 76 (2018).

Bonus

5 *Respondent violated Section 8(a)(5) and (1) by failing to pay employees a Christmas bonus in December 2015.*

10 Respondent violated the Act in failing to pay its employees a Christmas bonus in 2015 because such a bonus was paid with sufficient regularity that employees would have been justified in expecting to receive such a bonus as part of their wages, *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001); *Sykel Enterprises*, 324 NLRB 1125, 1125-26 (1997).⁵

Respondent violated the Act between January and September 2016 in unilaterally paying selected employees a bonus for excellent work and then unilaterally discontinuing that bonus.

15 A bonus paid on the basis on employee's performance on the job constitutes part of an employee's compensation, rather than a gift. *Ohio Edison Co.*, 362 NLRB No. 88 (2015) slip op. 1, 10-16, *enforcement denied on other grounds*, 847 F. 3d 806 (6th Cir. 2017). As such, such a bonus may be initiated and may be terminated only after giving the employees' union notice and an opportunity to bargain. In this case, Respondent initiated a weekly payment of \$50 to some employees; \$100 to other employees and none to all other unit employees, Exh. G.C. 64. Since this was tied to the work performed of employees, these payments could be characterized as "incentive payments" to selected employees, rather than, or as well as a bonus. It made these payments without notifying the Union or giving it an opportunity to bargain. Nine months later it discontinued this "bonus" unilaterally. Both by initiating these payments and stopping them unilaterally, Respondent violated Section 8(a)(5) and (1) of the Act, *Memc Electronic Materials*, 342 NLRB 1172, 1184, 1192 (2004).

CONCLUSIONS OF LAW

30 Respondent, Bob's Tire Co., Inc. violated Section 8(a)(5) and (1) by failing to notify the Charging Party Union in advance and offering it an opportunity to bargain about the subcontracting of unit work to Masis Staffing Solutions. Respondent violated the Act in failing to pay unit employees a Christmas bonus in 2015 as it had in previous years. Respondent violated the Act in unilaterally initiating bonus or incentive payments to unit employees in January 2016 and then unilaterally terminating these payments in September 2016.

REMEDY

40 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

⁵ These decisions strike me as possibly inconsistent with *Benchmark Industries*, 270 NLRB 22 (1984). This case could be distinguished, however, in deeming the cash payments herein as something other than the "token" gift of a 5 lb. ham that Benchmark ceased to provide its employees.

The Respondent, having unlawfully subcontracted with Masis Staffing and having failed to pay unit employees a Christmas bonus in 2015 must make unit employees whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Respondent shall file a report with the Regional Director for Region 1 allocating backpay to the appropriate calendar quarters. Respondent shall also compensate unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Bob's Tire Co., New Bedford, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally subcontracting bargaining unit work.

(b) Failing to pay a Christmas bonus which is an established past practice.

(c) Unilaterally paying bonuses or incentive payments to unit employees.

(d) Unilaterally stopping its payment of bonuses or incentive payments to unit employees.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- 5 (a) Make unit employees whole for any loss of earnings and other benefits suffered as a result of their unlawful subcontracting and its failure to pay a Christmas bonus in 2015 in the manner set forth in the remedy section of this decision.
- 10 (b) File a report with the Social Security Administration allocating backpay for these employees to the appropriate calendar quarters.
- 15 (c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 1, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.
- 20 (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- 25 (e) Within 14 days after service by the Region, post at its New Bedford, Massachusetts facility copies of the attached notice marked "Appendix"⁷ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 6, 2015.
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⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. December 7, 2018

Arthur J. Amchan

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Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT subcontract bargaining unit work without first notifying United Food and Commercial Workers Local Union 328 and providing it an opportunity to bargain over such proposed subcontracting.

WE WILL NOT fail to pay you a Christmas bonus in the manner such bonus was paid prior to the certification of the United Food and Commercial Workers Local Union 328 on October 15, 2015.

WE WILL NOT initiate or terminate bonus or incentive payments to unit employees without first notifying United Food and Commercial Workers Local Union 328 and offering it an opportunity to bargain about such payments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make unit employees whole for any loss of earnings less any net interim earnings and other benefits resulting from our unilateral subcontracting to Masis Staffing Solutions in 2016 and our failure to pay a Christmas bonus in December 2015 with interest compounded daily.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (617) 565-6700.